

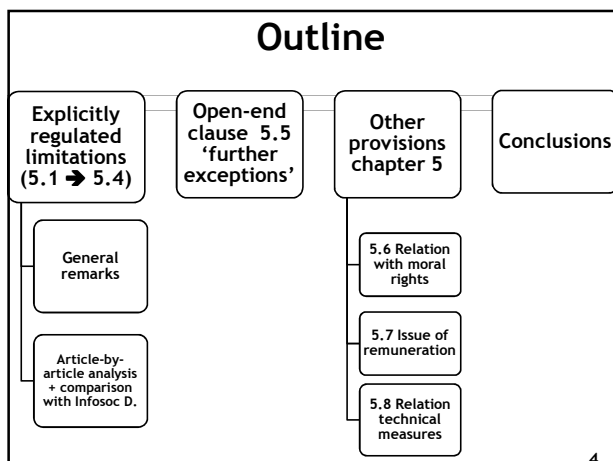
## PROJECT FOR A EUROPEAN COPYRIGHT CODE

### *“LIMITATIONS TO COPYRIGHT”*

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## Outline



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## General remarks on concrete limitations (5.1 → 5.4)

### ☐ “Limitations” (not “exceptions”)

✓ Infosoc D. : “Exceptions & Limitations”

### ☐ Infosoc D. → clearly starting point

✓ option for an enumerative list

✓ = ‘acquis’

### ☐ 18 explicitly regulated limitations

✓ Cf. Infosoc D. → 19 (+ mandatory exception = no longer exception)

✓ In both cases : completed with (wide/narrow) open clause

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## General remarks on concrete limitations (continued)

### ☐ “uses” permitted without authorisation

- ✓ All acts included in economic rights
  - Hence covers scope of art. 5.4 Infosoc D. (distribution right)
- ✓ No distinction between analogue and digital uses
  - However : it seems appropriate to differentiate in respect of the amount of remuneration (see art. 5.7)
- ✓ 2 exceptions : only a copy/reproduction is allowed
  - 5.1 (1) (back-up copy)
  - 5.3 (2) (private use)

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## General remarks on concrete limitations (continued)

### ☐ No reference to three-step test

- Drafters (EU legislator) assume that articles 5.1 - 5.4 conform to the requirements
  - ✓ certain special cases; no conflict with normal exploitation of the work; no unreasonable prejudice to legitimate interests of author/right holder ?
- ‘A contrario’ → Explicit mention of test in 5.5 ‘further limitations’
  - ✓ test has to be ‘applied’ by courts to allow for exception

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## General remarks on concrete limitations (continued)

### ☐ Consistent wording & conditions for all exceptions

- ✓ “permitted without authorisation”
- ✓ “to the extent justified by the purpose of the use” (not in 5.1)
- ✓ Transparent structure (without/with) remuneration (infra)

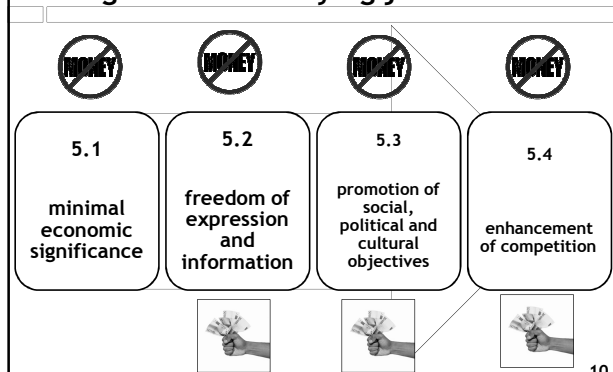
### ☐ Quid ‘compulsory’ character ?

- Can copyright owners ‘contract out of’ limitations?
  - ✓ to be discussed in the context of copyright contract provisions’
- ✓ Relationship with TPMs → see infra

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## Concrete limitations → regrouped in 4 categories ~ underlying justification




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## Art. 5.1

### Uses with minimal economic significance

- 1) the making of a back-up copy of a work by a person having a right to use it and insofar as it is necessary for that use
  - ✓ Software D. art. 5.1.(2) : "the making of a back-up copy by a person having a right to use the CP insofar as it is necessary for that use" + "may not be prevented by contract"
- 2) the incidental inclusion of a work in other material
  - ✓ Infosoc D. art. 5.3.(i) : "incidental inclusion of a work or other subject-matter in other material"
- 3) use in connection with the demonstration or repair of equipment, or the reconstruction of an original or a copy of a work
  - ✓ Infosoc D. art. 5.3.(l) : "use in connection with the demonstration or repair of equipment"
  - ✓ Infosoc D. art. 5.3.(m) : "use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building"

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## Art. 5.2 : for the purpose of freedom of expression and information

- a) use of a work for the purpose of the reporting of contemporary events
  - ✓ Infosoc D. art. 5.3(c) : "use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose (+ source)"
- b) use of published articles on current economic, political or religious topics or of similar works broadcast by the media, provided that such use is not expressly reserved
  - ✓ Infosoc D. art. 5.3(c) : "reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved (+ source)"

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## Art. 5.2 : for the purpose of freedom of expression and information (continued)



- c) use of works of architecture or sculpture, made to be located permanently in public places
  - ✓ Infosoc D. art. 5.3 (h) : "use of works, such as works of architecture or sculpture, made to be located permanently in public places"
- d) use by way of quotation of lawfully disclosed works
  - ✓ Infosoc D. art. 5.3(d) : "quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, (+ source) and that their use is in accordance with fair practice, (...)";
- e) use for the purpose of caricature, parody or pastiche
  - ✓ Infosoc D. art. 5.3(k): "use for the purpose of caricature, parody or pastiche"

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## Art. 5.2 : for the purpose of freedom of expression and information



- a) use of single articles for purposes of internal reporting within an organisation
  - ✓ Infosoc D. art. 5.2 (a) reprography but broader (including closed network environment)
- b) use for purposes of scientific research
  - ✓ Infosoc D. art. 5.3(a) : "use for the sole purpose of (...) scientific research (+ source) to the extent justified by the non-commercial purpose to be achieved"
  - ✓ Teaching and research are divided up
  - ✓ Remuneration even if non commercial nature?

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## Art. 5.3 : to Promote Social, Political and Cultural Objectives (1)



a) use for the benefit of persons with a disability, which is directly related to the disability and of a non-commercial nature

Infosoc D. art. 5.3(b) : "uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability"

NOTE : negotiations WIPO Treaty

b) use to ensure the proper performance of administrative, parliamentary or judicial proceedings or public security

Infosoc D. art. 5.3(e): "use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings"

c) use for the purpose of non-commercial archiving by publicly accessible libraries, educational establishments or museums, and archives

Infosoc D. art. 5.2(c) : "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage"

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## Art. 5.3 : to Promote Social, Political and Cultural Objectives (2)



**reproduction by a natural person for private use, provided that the source from which the reproduction is made is not an obviously infringing copy**

- Infosoc D. art. 5.2(a) + (b) but seriously modified:
- Only if not made 'from obviously infringing copy' (cf. Germany)
- Reprography (a) more restricted → only 'natural person' & 'for private use' & more extensive → no exclusion for sheet music (but off course 'private')
- Private copy (b) : difficult compensation issue not solved + no explicit condition of 'non commercial purposes'
- NOTE : to be combined with right to back-up copy (5.1)

**use for educational purposes**

- Infosoc D. art. 5.3(a) : "use for the sole purpose of illustration for teaching (...) (+ source) and to the extent justified by the non-commercial purpose to be achieved"
- No distinction commercial/non-commercial !

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## Cf. Infosoc D. Art. 5.2

**(a) in respect of reproductions on paper or any similar medium**

- effected by the use of any kind of photographic technique or by some other process having similar effects,
- with the exception of sheet music,
- provided that the rightholders receive fair compensation;

**(b) in respect of reproductions on any medium**

- made by a natural person
- for private use
- and for ends that are neither directly nor indirectly commercial,
- on condition that the rightholders receive fair compensation
- which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned

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## Art. 5.4 : for the purpose of enhancing competition (1)



**use for the purpose of advertising public exhibitions or sales of artistic works or goods which have been lawfully put on the market**

- Infosoc D. art. 5.3(j): "use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use"
- Broader scope → ECJ Dior/Evora, C-337/95

**use for the purpose of reverse engineering in order to obtain access to information, by a person entitled to use the work**

- Simplified version of art. 6 Software D.
- Any purpose allowed? (contra software D.)

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## Art. 5.4 : for the purpose of enhancing competition (2)



- ❑ Use of certain works which are indispensable to compete ...
  - Limitation existing outside copyright (EU competition law) turned into internal boundary
  - Language modelled after ECJ Magill C-241/91
    - ✓ See also IMS Health C-418/2001
- ❑ Rationale
  - to prevent authors/rightholders from blocking potential markets for new products and services which are based on works of more than one author/rightholder
  - "The problem addressed poses itself in particular in the digital and networked environment, where in view of the information overload, there is an ever-increasing need for information value-added products and services which are based on pre-existing works or protected parts thereof. Since these information products and services are based of works of more than one author/rightholder, it is extremely difficult, if not impossible, to licence. However, in the information society, such information products and services are of a vital importance"

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## Art. 5.4 : for the purpose of enhancing competition (2)



### Note !

- Only uses of news articles, scientific works, industrial designs, computer programs and databases
- i.e. various authors → difficult to license
- "against payment of a negotiated remuneration"
- i.e. no role for collective rights management

### One exception : 3 cumulative conditions

- the use is *indispensable to compete* on a derivative market
- the owner of the copyright in the work has *refused to license* the use on reasonable terms, leading to the elimination of competition in the relevant market and
- the use does *not unreasonably prejudice* the legitimate interests of the owner of the copyright in the work.
- Note : only 3rd step of three-step test

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## Not in Copyright Code (?)

- ❑ art. 5.2 (d)
  - ✓ in respect of **ephemeral recordings** of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted
    - BUT : temporary reproduction without independent economic significance?
    - BUT : preservation is covered in archiving exception
- ❑ art. 5.2 (e)
  - ✓ reproductions of **broadcasts made by social institutions** pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation
- ❑ Art. 5.3 (f) :
  - ✓ **use of political speeches** as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informative purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible
    - Partly set off by
      - "use for reporting of contemporary events" (5.2.1.a)
      - "Excluded works" : official texts & official published documents (art. 1.2)

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## Not in Copyright Code (?)

- ❑ **art. 5.3 (g)**
  - ✓ use during **religious celebrations** or official celebrations organised by a public authority
- ❑ **art. 5.3 (n)**
  - ✓ use by communication or making available, for the purpose of research or private study, to individual members of the public **by dedicated terminals on the premises of establishments** referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;
    - BUT : included in 5.2.(2)(b) : use for purposes of scientific research & 5.3.(2)(b) : use for educational purposes
- ❑ **Art. 5.3 (o)**
  - ✓ use in certain **other cases of minor importance** where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article
    - BUT : art. 5.5 'Further Limitations' = more + less broader in scope
- ❑ **Quid public lending ?**
  - Not included in list of economic rights (see note 38)

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## Quid exceptions software & databases ?

### Exceptions from Software D.

- Back-copy : OK
- Acts necessary for use : partly taken care of in definition Right of reproduction (art. 4.2)
- Right 'to observe, study or test the functioning of the program' : idem
- Reverse engineering : OK

### Exceptions from Database D. (copyright)

- Acts necessary for normal use : cf. Software
- Reproduction for private purposes of a non-electronic database
  - Scope is broadened to all databases in art. 5.3.2.a
- Use for (illustration of) teaching and scientific research : OK
- Public security & administrative or judicial procedures : OK
- Other limitations allowed under national law: = unified

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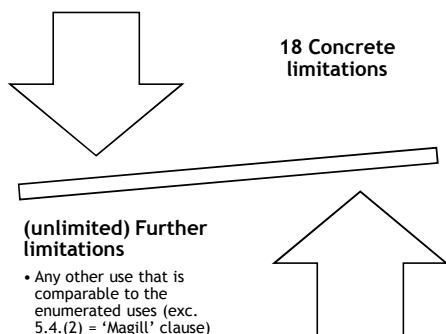
## Outline

Concrete limitations  
(art. 5.1 → 5.4)

Open-end clause:  
'further  
exceptions'  
(5.5)

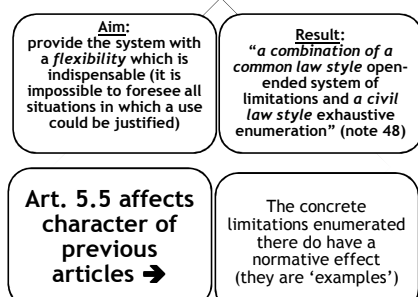
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## Overall picture of limitations



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## 5.5 : (Any) use that is *comparable* to any of the uses enumerated



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## Limits to allow 'further limitations (art. 5.5)

- ☐ **Quid rule of restrictive interpretation ?**
  - Rule developed by many jurisdictions in droit d'auteur countries
- ☐ **Necessity of a link with an existing exception**
  - A certain analogy has to be established with expressly enumerated uses
- ☐ **Application of corresponding requirements of the 'comparable' limitation**
  - 'Blending' the criteria of articles 5.1 to 5.3 is not sufficient
  - Includes the obligation (or not) to pay remuneration

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## Limits to allow 'further limitations (art. 5.5)

- ❑ **Permission is subject to (revised version of) three-step test**
  - Use does not conflict with the normal exploitation of the work
  - Use does not unreasonably prejudice the legitimate interests of the author or rightholder
    - ✓ Berne, WCT → author's interests (but no neighbouring rights protection)
    - ✓ Infosoc D. & TRIPS → rightholder's interests
  - Assessment should take into account the legitimate interests of 3<sup>rd</sup> parties
    - ✓ Inspired by case law (WTO IMRO case) and legal doctrine
    - ✓ Cf. Trips provisions in relation with exceptions to industrial property rights (17, 26, 30)
- ❑ **Courts have to apply (not merely interpret existing provision in the light of) the second and third prong of the test**

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## Art. 5.6 - Relation with moral rights "Without prejudice to ..."

- 1) the right of divulagation
  - ✓ But without prejudice to right of freedom of expression
- 2) the right of attribution, unless such attribution is not reasonably possible
  - ✓ Infosoc.D. : "as long as the source, including the author's name, is indicated, unless this turns out to be impossible"
  - ✓ Not applicable to 5.1 : incidental use & use for reconstruction
- 3) the right of integrity, unless the applicable limitation allows for such an alteration or the alteration is reasonably due to the technique of reproduction or communication applied by the use
  - ✓ Not applicable to 5.4 : enhancement of competition

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## Art. 5.7 : Amount and collection of remuneration

**Any remuneration provided for under this chapter shall be fair and adequate**

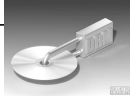
- Note 57 : it seems appropriate to differentiate the amount of remuneration due depending on the economic significance of the use act to the user
- Unification of limitations that are subject to remuneration
- Still lacking : unified criteria as regards calculation amount, system of perception, ... (subsisting problems of territoriality)

**A claim for remuneration according to articles 5.2(2) and 5.3(2) can only be exercised by a collecting society**

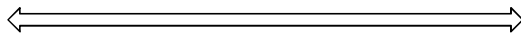
- i.e. internal reporting within an organisation, scientific research, reproductions for private use, educational use

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## Art. 5.8. Limitations prevailing over technical measures



Principle that limitations take preference over TPMs/DRMs



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## Art. 5.8. Limitations prevailing over technical measures

In cases where the use of copyright protected works is controlled by technical measures,

➤ the rightholder shall have **an obligation to make available** means of benefiting from the uses mentioned in articles 5.1 through 5.5

➤ Except limitation of private copy

➤ **on condition that**

- the beneficiary of the limitation has **lawful access** to the protected work,
- the use of the work is **not possible** to the extent necessary to benefit from the limitation concerned, and
- the rightholder is not prevented from adopting adequate measures regarding **the number of reproductions** that can be made.

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## Conclusions

❑ For some years → demand to reform copyright limitations

▪ Complete harmonisation process (more mandatory provisions)

✓ Green Paper Copyright in the Knowledge Economy 16 July 2008

- Q 3: Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?
- Q 4: Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?

▪ Include sufficient flexibility to keep system adjusted to reality

▪ Redress balance between exclusive rights and limitations

❑ Code is important reference tool to address these concerns

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